



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 10417 OF 2023

Sadanand Ramchandra Newase

Age : 65 years, Occ.: Agriculturist,
R/at Newase Vasti, Phaltan -
Baramati Road, Sastewadi, Taluka
Phaltan, Dist. Satara

...Petitioner

Vs.

1. Rajeshwari Suresh Newase

Age : 67 yrs, Occ.: Housewife
R/a. Near Maharaja Mangal Office
Tal. Faltan, Dist. Satara.

2. Tanuja Shrikant Dhage

Age : 32 Yrs, Occ.: Housewife
R/at: Flat no. 41, Navjyot Women's
Hsg. Society, Tavenagar, MIDC
Tal. Baramati, Dist. Pune

...Respondents

Mr. Jayendra D. Khairnar	Advocate for the Petitioner
Mr. D. D. Rananaware	Advocate for the Respondent Nos. 1 and 2

CORAM : S. M. MODAK, J.

DATE : 15th OCTOBER 2024

ORAL JUDGMENT :-

1. The only issue arisen in this writ petition is whether the trial

Court was justified in refusing permission to adduce secondary evidence to the Petitioner-Applicant.

2. Petition was filed for grant of probate under Section 218 of the Indian Succession Act, at page no. 16 by the Petitioner who is brother of the deceased-Suresh. Initially, there were no opponents. These Respondents are the wife and daughter of the deceased-Suresh. They appeared on their own, and they were impleaded as opponents.

3. Considering the limited controversy, I have finally heard learned Advocate Shri Khairnar for the Petitioner and learned Advocate Shri Rananaware for Respondent Nos. 1 and 2.

4. The application for probate was filed on the basis of the unregistered will dated 16.08.2017 executed by deceased-Suresh. According to the Petitioner, it was notarized will. After Respondents have filed their replies and when the matter is fixed for recording of the evidence, the present Petitioner has filed an application for grant of permission to produce photocopy of the notarized will. According to him, he lost the original. The Respondents took strong objection for granting permission. The trial Court has rejected it as per Order dated 02.02.2023.

5. Learned Advocate Shri Rananaware has taken various objections and he invited my attention to the stamp paper of the will. Certain incorrect information are mentioned in the will including the date of the marriage of the deceased with his wife and description of the property. He has also invited my attention to the several averments in the reply filed before the trial Court. It is true that this contention does not deal with the involved issue in this petition, and it relates to the merits of the matter.

6. The only issue is whether the Petitioner has made out the case for grant of the permission to adduce secondary evidence.

7. When I have read the impugned order ,what **I find is trial Court has given following reasons:-**

- a) The will dated 29.07.2017 was notarized and copy sought to be produced is photocopy.
- b) The Petitioner has not filed certified/true copy of that will.
- c) The Petitioner has not taken steps for adducing the secondary evidence.

8. It is true that in the application, the Petitioner has explained that the original will was not found with him. Learned Advocate Mr.

Rananaware has also emphasized on lacunae in the pleadings so to say the Petitioner has not explained how he got custody of the original will.

9. It is true that when the question of proving a will arises, the testator is not alive. It is proved through attesting witnesses. In this case, the original will is not available. So there is going to be lacunae in the case of the Petitioner.

10. When the Petitioner contends that he has lost the original, the Respondent by way of reply has taken various contentions about authenticity of the will. This application was supported by an affidavit. It is true that if permission is granted to adduce secondary evidence, the photocopy can be read in the evidence, if proved by following proper procedure. Copy made by mechanical process is a secondary evidence as contemplated as per clause (2) of Section 63 of Indian Evidence Act. It is true original will is not available (being lost) for comparison. But the Respondents can take all ground in cross-examination. You cannot debar the Party from proving its case. Appreciation will come at later stage.

11. I think averments in the application that it is lost and supported

by affidavit are sufficient to make out the case for grant of permission to adduce secondary evidence. **So the trial Court was wrong in rejecting the application.** There is no question of producing certified copy or true copy. The copy sought to be produced is photocopy. All contentions about how the Petitioner got custody of the original will and the lacuane in the will are kept open.

12. With these observations following order is passed:-

ORDER

- (i) Writ Petition is allowed.
- (ii) The order dated 02.02.2023 passed by the Court of the 4th Joint Civil Judge Senior Division, Satara in Probate Application No. 21 of 2020 is set aside.
- (iii) The Petitioner is permitted to adduce secondary evidence by producing photocopy of the will dated 16.08.2017.
- (iv) The trial Court to consider that photocopy as evidence subject to its proof.

13. All contentions of the Respondents are kept open.

[S. M. MODAK, J.]